

Hearing Date: May 9, 2007, 2006 at 10:00 a.m. (EDT)

Response Deadline: April 27, 2007 (EDT)

CAMPEAU GOODSSELL SMITH, L.C.
WILLIAM J. HEALY, #146158
440 N. 1st Street, Suite 100
San Jose, California 95112-4024
Telephone: (408) 295-9555
Facsimile: (408) 295-6606

ATTORNEYS FOR CREDITOR
Robert Membreno, Trustee of SAI Trust

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:)	CHAPTER 11
CALPINE CORPORATION, et al,)	Case No. 05-60200 (BRL)
)	Jointly Administered
Debtor.)	

**RESPONSE OF ROBERT MEMBRENO, TRUSTEE OF SAI TRUST TO DEBTORS'
ELEVENTH OMNIBUS OBJECTION TO PROOFS OF CLAIMS, EQUITY INTEREST
CLAIMS, UNLIQUIDATED CLAIMS, ANTICIPATORY CLAIMS, CLAIMS TO BE
ADJUSTED AND WRONG DEBTOR CLAIMS TO BE ADJUSTED**

TO: THE HONORABLE BURTON R. LIFLAND
UNITED STATES BANKRUPTCY JUDGE.

Robert Membreno, Trustee of SAI Trust ("SAI") files this response to DEBTORS'
ELEVENTH OMNIBUS OBJECTION TO PROOFS OF CLAIMS, EQUITY INTEREST CLAIMS,
UNLIQUIDATED CLAIMS, ANTICIPATORY CLAIMS, CLAIMS TO BE ADJUSTED AND
WRONG DEBTOR CLAIMS TO BE ADJUSTED ("Objection"), and in support hereof, respectfully
requesting the Objection be overruled or withdrawn and stating as follows:

A. DEBTORS' OBJECTION:

1. On April 5, 2007, Calpine and certain of its direct and indirect subsidiaries
(collectively, the "Debtors"), filed DEBTORS' ELEVENTH OMNIBUS OBJECTION TO

1 PROOFS OF CLAIMS, EQUITY INTEREST CLAIMS, UNLIQUIDATED CLAIMS,
2 ANTICIPATORY CLAIMS, CLAIMS TO BE ADJUSTED AND WRONG DEBTOR CLAIMS TO
3 BE ADJUSTED) (the "Objection").

4 2. The Objection, specifically pages 7-8, paragraphs 21-24, and Exhibit D, seek to
5 disallow and expunge timely filed Proofs of Claim on the grounds:

6 "23. The reason that the Debtors are objecting to these Unliquidated Claims
7 is because the Bar Date set in these Chapter 11 Cases was more than eight months
8 ago and the Chapter 11 Cases have been pending for more than a year, while the
9 claimants who filed these claims still have not supplemented their proofs of claim
10 to substantiate and liquidate the claims or provided the Debtors with any additional
11 information regarding the Unliquidated Claims. The Debtors have thoroughly reviewed
12 their books and records and other information concerning each Liquidated Claims
13 that has been made available to them, and submit that without additional information
14 from the claimants, the Unliquidated Claims are unenforceable under section 502 (b)(1)
15 of the Bankruptcy Code or any other applicable law or agreement."

16 3. By the Objection, the Debtors, the holders of written contracts, holders of the
17 documentation regarding the income and expenses relating to the written contracts, the parties to a
18 written contracts, the defendants in a filed civil action which, inter alia, seeks an accounting, and the
19 parties withholding information from SAI, seek to disallow, without discovery, hearing, or trial,
20 SAI's timely filed Proofs of Claims and eliminate SAI's pre-petition and bankruptcy stayed state
21 court litigation underlying and relating to these Proofs of Claim, namely ROBERT MEMBRENO,
22 TRUSTEE of THE SAI TRUST vs. FREEPORT MCMORAN RESOURCE PARTNERS, a Limited
23 Partnership; SANTA ROSA GEOTHERMAL COMPANY, L.P., SONOMA GEOTHERMAL
24 PARTNERS, L.P.; CALPINE SONOMA, INC.; CALPINE GEYSERS COMPANY, L.P.;
25 CALPINE CORPORATION,, and DOES ONE through, FIFTY, inclusive, Santa Clara Superior
26 Court Case No. 1-05-CV-041957 ("State Action").

27 4. The Objection must be withdrawn or overruled as Debtors cannot be allowed to
28 ignore their contractual obligations to SAI, withhold documents and evidence from SAI, prevent

SAI from pursuing its State Action, take advantage of the bankruptcy stay, not ask claimant for additional information, and then, on short notice, try to expunge these timely filed Proofs of Claim, and otherwise mislead this court regarding Debtors' alleged investigation and lack of knowledge.

B. ANSWER

5. SAI elects not to respond to the representations of counsel in paragraphs 1-20 and 25-45 and Exhibits A-C and E-H as they are either procedural or do not apply to SAI and reserves its right to admit or deny or otherwise respond to these representations of counsel. To the extent a response is required, SAI denies these representations.

6. SAI specifically denies the representations in paragraphs 21-24.

C. RESPONSE:

I. Factual Background:

7. On or about May 17, 1987, SAI Geothermal, Inc. (hereinafter "SAI") and FREEPORT MCMORAN RESOURCE PARTNERS, L. P. ("FREEPORT") entered into an agreement entitled "Agreement For Purchase And Sale Of Assets (hereinafter "Agreement For Purchase") Article I, paragraph 1.2 (e) of the Agreement For Purchase provides, in pertinent part, that after commercial operation of a geothermal power plant to be constructed by FREEPORT known as West Ford Flat located in Sonoma County, California, that FREEPORT would pay to SAI a Net Profit Interest (hereinafter "NPI") representing the right to receive a monthly payment in an amount equal to 6% of the Net Income for the month. (Exhibit A)

8. SAI assigned its rights to receive 4.55 percent of the NPI to Plaintiff SAI TRUST and by letter dated August 4, 1989, so advised FREEPORT. Specifically, paragraph 1.2 (e) of the Agreement For Purchase provides, in pertinent part: "After the Date of First Commercial Operation, Buyer shall pay Seller, the amount of the Net Profits Interest, commencing as provided in Section 1.5, which shall be calculated and paid monthly in arrears not later than the 20th day of the following month." Section 9.10, in pertinent part, defines Net Income as "... the gross revenues received by Buyer from the Project minus the sum of the following : (i) if Option 1 has been selected, the cost of steam for the Project, which shall be calculated using the base price and price

1 adjustments set forth in Section 19 of the Steam Sales Agreement (regardless of whether the Steam
2 Sales Agreement has terminated), (ii) all Project direct operating expenses (excluding depreciation),
3 (iii) general and administrative expenses associated with the Project, which shall be calculated as
4 15% of Project direct operating expenses (excluding depreciation and real estate taxes), (iv) the cost
5 of any Project related capital additions made subsequent to the Date of First Commercial Operation,
6 and (v) if the Project or a portion thereof is financed through Project Financing, principal, interest,
7 reserves and any fees payable in respect of the Project Financing. For purposes of calculating the
8 gross revenues of the Project, actual revenues received by the Buyer shall be used, unless Buyer has
9 caused the PPA to be amended to provide for lower prices than provided for on the date of this
10 Agreement, to obtain or retain any advantage of Buyer, in which event the gross revenues shall be
11 deemed to be the revenues Buyer would have received under the PPA in effect on the date of this
12 Agreement for delivery of the energy actually delivered. For purposes of calculating the direct
13 operating expenses and the general and administrative expenses, the Accounting Procedure provided
14 in Exhibit F shall govern.”

15 9. Effective July 2, 1990, FREEPORT assigned its interest in, to, and under the
16 Agreement For Purchase and a Standard Offer 4 Power Purchase Agreement it received from Pacific
17 Gas & Electric Company (“Assigned Agreements”) to Calpine.

18 10. On or about December 31, 1994 Calpine entered into a Settlement Agreement
19 (hereinafter “Settlement Agreement”) addressing past and future NPI related issues, including
20 Overnight Interest, Escrow Balance, Debt Amortization, Audit Fees, and NPI Reports and
21 specifically preserving the Agreement For Purchase and rights and remedies therein. (Exhibit B)

22 11. Section 1.6 of The Agreement For Purchase provides, in pertinent part that “Buyer
23 shall maintain complete and accurate accounting records of the account which are used to calculate
24 the net Profits Interest. Within 60 days after the end of each fiscal year of Buyer, commencing with
25 the fiscal year of Buyer in which the Date of First Commercial Operation occurs, it shall furnish
26 Seller with a statement certified by Buyer’s chief financial officer showing in reasonable detail the
27 calculation of the Net Profits interest for the fiscal year ended....Seller and its authorized

1 representatives shall have the right, upon reasonable notice to Buyer and between 9 A.M. and 5 P.M.
2 weekdays to audit Buyer's records to determine whether the calculation of the Net Profits Interest
3 during the fiscal year then ended was in accordance with this Agreement. Buyer shall cooperate
4 reasonably with Seller as it conducts its audit."

5 12. SAI has not received a statement certified by Debtors' chief financial officer
6 as required by the Agreement For Purchase since at least the fiscal year ending 2000. As a direct
7 result SAI has not been able to audit Debtors' records to determine whether the calculation of the
8 NPI for the fiscal years following 2000 were in accordance with the Agreement For Purchase. SAI
9 noticed increases in costs, inclusions of costs, and allocations of costs since receipt of its last
10 statement certified by Debtors' chief financial officer. SAI has attempted to communicate with
11 Debtors and evaluate whether the uncertified NPI figures were reasonable and whether these
12 increases on costs, inclusions of costs, and allocations of costs are in accordance with the Agreement
13 For Purchase and Settlement Agreement.

14 13. Debtors have not maintain complete and accurate accounting records of the
15 accounts used to calculate NPI, have not maintained accounting records sufficient to show in
16 reasonable detail the calculation of NPI in accordance with the Agreement For Purchase, have not
17 maintained accounting records sufficient to show in reasonable detail the calculation of direct
18 operating expenses and the general and administrative expenses in accordance with the Agreement
19 For Purchase, and have not properly accounted for the general and administrative expenses in
20 accordance with the Agreement For Purchase. Debtors have not provided SAI with sufficient access
21 to its records to determine whether the calculation of NPI, although uncertified by the chief financial
22 officer, was in accordance with the Agreement For Purchase and have not reasonably cooperated
23 with SAI so SAI could conduct its audit of the uncertified records.

24 14. SAI brought to Debtors' attention that it noticed increases in costs, inclusions of
25 costs, and allocations of costs since receipt of its last statement certified by Debtors' chief financial
26 officer. SAI attempted to communicate with Debtors and determine whether these increases on
27 costs, inclusions of costs, and allocations of costs are in accordance with the Agreement For
28

Purchase and Settlement Agreement. As of the date of this complaint Debtors have not properly provided SAI with statements certified by their chief financial officer, have not provided SAI with sufficient access to its records to determine whether the calculation of NPI (although uncertified by the chief financial officer) was in accordance with the Agreement For Purchase, have not reasonably cooperated with SAI so SAI could conduct an audit of the uncertified records, have not maintain complete and accurate accounting records of the accounts used to calculate NPI, have not maintained accounting records sufficient to show in reasonable detail the calculation of NPI in accordance with the Agreement For Purchase, have not maintained accounting records sufficient to show in reasonable detail the calculation of direct operating expenses and the general and administrative expenses in accordance with the Agreement For Purchase, have not properly accounted for the general and administrative expenses in accordance with the Agreement For Purchase, have not identified and accounted for many costs associated with the operation of the power plant governed by the Agreement For Purchase, have improperly included and allocated costs to SAI and have failed and refused to identify and account for many costs associated with the operation of the power plants governed by the Agreement For Purchase.

15. On May 26, 2005, SAI filed the State Action against Debtors and others, generally predecessors, successors, assignors, assignees and/or partners of Debtors. The party and non-party witnesses, the voluminous documentation, the subject steam plant operation, and the counsel for SAI and Debtors are all located in Northern California. The State Action asserts various causes of action, including: Accounting; Breach of Contract; Specific Performance; and Declaratory Relief.

16. In an effort to resolve the ongoing disputes regarding Debtors' non-compliance with the Agreement For Purchase and Settlement Agreement, SAI and its counsel meet with Debtors, representative employees of Debtors, and Debtors' counsel. Such discussions did not resolve the ongoing disputes. However, Debtors acknowledged, inter alia, they were unaware of the underlying agreements, have not complied with the underlying agreements in several respects, have not maintained the books and records reasonable detail to properly calculate direct operating expenses and the general and administrative expenses in accordance with the underlying agreements, and have

1 not properly accounted for the general and administrative expenses in accordance with the
2 underlying agreements, but rather, caused SAI to bear the expenses from adjacent plants inconsistent
3 with the underlying agreements due to their own accounting preferences.

4 17. Debtors and others filed answers to the State Action. SAI propounded discovery on
5 parties of the State Action. In August 2005 and January 2006, Debtors filed Case Management
6 Conference Statements with the state court and represented to the state court, inter alia, "The
7 Calpine Defendants anticipate that plaintiff's document discovery will involve an enormous volume
8 of documents. Expert witness discovery will also be necessary."

9 18. On December 20, 2005, December 21, 2005, February 3, 2006, and May 2, 2006,
10 various Debtors filed petitions for bankruptcy effectively staying prosecution of the State Action.
11 Notices of the bankruptcy and the stay were filed in the State Action and served on SAI.

12 19. At least three Defendants to the State Action, namely Calpine Geysers Company,
13 L.P., Santa Rosa Geothermal Company, L.P., and Sonoma Geothermal Partners, L.P. served
14 discovery responses and indicated that documents responsive to SAI document requests were
15 transferred to Geysers Power Company, LLC on December 22, 2000 as part of a Agreement for
16 Purchase and Sale Of Assets. According to these same entities, Santa Rosa Geothermal Company,
17 L.P. changed its name to Calpine Geysers Company, L.P. on December 20, 1993, Sonoma
18 Geothermal Partners, L.P. was a general partner of Santa Rosa Geothermal Company, L.P., Calpine
19 Sonoma, Inc. was a general partner of Santa Rosa Geothermal Company, L.P. A Bill of Sale And
20 Assignment And Assumption Agreement and Memorandum Of Bill Of Sale And Assignment And
21 Assumption Agreement dated December 2000 provided by Debtors to SAI in the State Action is
22 attached hereto as Exhibit C. Otherwise, these discovery responses did not provide any substantive
23 information relative to the State Action.

24 20. On or about July 18, 2006, the remainder of State Action was stayed by the court
25 because the named defendants and potential doe defendants were Debtors.

26 21. On July 27, 2006, SAI timely filed Proofs of Claim as indicated in the Objection,
27
28

1 Exhibit D¹. Attached to each Proof of Claim was an “Attachment to Proof of Claim” which detailed
2 the factual background of the State Action, identified the substantive issues, and invited Debtors to
3 contact SAI if it wanted to review the supporting documents currently available. SAI’s proofs of
4 claims do not carry specific figures because Debtors have thus far failed or refused to provide SAI
5 with an annual certification from its chief financial office as required by the underlying agreements,
6 prevented SAI from conducting an audit, and not provided documentation or discovery in the State
7 Action and the bankruptcy stay has thus far prevented SAI from prosecuting the State Action and
8 conducting related discovery. For example, Debtors admitted failure and refusal to provide an
9 annual certification of the NPI calculation (income and expenses) is by itself a breach of the
10 underlying agreements; Debtors admitted inclusion of expenses from other plants not subject to the
11 underlying agreements is by itself a breach of the underlying agreements; and Debtors’ admitted
12 “apportionment” of expenses from other plants and improper characterization as general overhead
13 expenses for unrelated plants as “direct expenses” is by itself a breach of the underlying agreements.
14 The only practical issues are securing a determination of the proper amount of expenses to be used
15 to properly calculate the NPI and monies owing to SAI and, if Debtors’ continue to breach the
16 agreements, a court judgment declaring the rights and obligations of SAI and the Debtors under the
17 underlying agreements and requiring specific performance. As virtually all the factual and
18 documentary evidence used to determine the amounts paid and payable to SAI pursuant to the
19 underlying agreements rests with and/or are generated by Debtors, their purported ignorance is
20 unpersuasive. SAI’s claims, depending on and subject to the results of the audit and accounting, are
21 estimated to range from the mid-\$100,000 range to several hundreds of thousands, plus interest and
22 attorneys fees as provided for in the underlying agreements.

23 22. Debtors have never requested any information regarding SAI’s Proofs of Claim.

24 **II. Debtors’ Claim Objection Is Deficient:**

25 23. “A proof of claim executed and filed in accordance with these rules constitutes *prima*

26
27 ¹SAI only attaches one of the six Proofs of Claim as they are similar.

1 *facia* evidence of the validity of the claim.” FED. R. BANK. P 3001 (f). SAI executed and filed the
2 various claims in accordance with the Federal Rules of Bankruptcy Procedure and the Debtors have
3 not alleged otherwise. The Debtors must offer sufficient evidence to overcome the presumptive
4 validity of the claim (In re Duggins, 263 B.R. 233, 238 (Bankr. C.D. Ill. 2001 (stating that a filed
5 proof of claim gives rise to a “rebuttable presumption” as to the validity and amount of the claim).

6 24. Debtors have offered no evidence to support the representations of counsel contained
7 in the Objection. The Debtors are required to submit evidence of equal or greater probative value
8 contradicting the elements of SAI’s claims. (Southland Corp. v. Toronto-Dominion (In re Southland
9 Corp.), 160 F.3d 1054 (5th Cir. 1980). The mere denial by Debtors’ counsel that the claimant has not
10 supplemental the claims (when there has never been such a request) and that without additional
11 information the claims are unenforceable is insufficient to rebut the *prima facie* validity of the claim
12 (In re Frederes, 98 B.R. 165, 167 (Bankr. W.D.N.Y. 1989) and the vague objection does not satisfy
13 Debtors’ burden (In re Narragansett Clothing Co., 143 B.R. 582, 583 (Bankr. D.R.I. 1992).

14 **III. SAI Will Promptly File A Motion For Relief From Stay In Order To Proceed With**
15 **The State Action, To Secure Documents And Evidence From Debtors, and To Establish The**
16 **Specific Amounts Owed And Owing To SAI Through A Formal Accounting:**

17 25. SAI will promptly file a motion for relief from stay in order to proceed with the State
18 Action. The State Action will require Debtors, as provided for in the underlying agreement, to
19 provide documentation of the income and expenses which constitute the NPI payable to SAI, to
20 establish compliance with the express terms of the underlying agreement regarding proper
21 calculation of the NPI, including proper application of expenses, to establish that its chief financial
22 officer has not certified Debtors’ compliance with the underlying agreement and calculation of the
23 NPI payable to SAI, and to allow SAI to inspect such voluminous records of Debtors at Debtors’
24 facility in Northern California. The State Action will also formally liquidate SAI’s claims.

25 26. SAI submits that all substantive party and non-party witness reside or do business in
26 Northern California, all substantive documents are all located within Northern California, according
27 to Debtors, Debtors’ documentation is too voluminous to move from its plant in Northern California

1 and would have to be inspected at the subject plant in Northern California, the subject plant is
2 located and operates only in Northern California, and SAI's and Debtors' counsel are located in
3 Northern California.

4 **IV. SAI's Claims Must Be Allowed As Filed:**

5 27. For the foregoing reasons, Debtors Objection to SAI's claims, KCC#2672, 2677,
6 2678, 2798, 2799, and 2802, must be overruled or withdrawn and SAI's claims remain as filed until
7 supplemented by SAI.

8 Dated: April 26, 2007

CAMPEAU GOODSSELL SMITH

9 /s/ William J. Healy
10 William J. Healy
11 Attorneys for Creditor
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27